RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

ALEXANDER DUNN *v.* GRAND TRUNK RAILWAY COMPANY OF CANADA.

If a person enters the saloon-car of a freight railway train, and, when the train starts, without being requested or directed to leave, remains there as a passenger, contrary to the rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first-class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger train.

On exceptions to the rulings of the Superior Court for the county of *Cumberland.*

Case for an injury alleged to have been received in July, 1868, while being transported from South Paris to Danville Junction, through the alleged insufficiency of the track and cars of the defendants, and the careless and negligent manner of managing them.

There was evidence tending to show that the plaintiff entered the saloon-car attached to the defendants' freight train, at South Paris station, for the purpose of going to Danville Junction; that the conductor saw him when the train started, and they conversed together; that he paid the conductor the usual fare of eighty-five cents; that the saloon-car was thrown from the track and dumped; that the plaintiff was thereby injured; that the car was thrown off by a broken rail, and that the fare was thereupon paid back.

There was evidence on the part of the defence, tending to show that the conductor notified the plaintiff when the train started that he had no right to carry passengers on the freight train, which was denied by the plaintiff.

It also appeared that the defendants issued a notice on May 23d 1866, that after that date "passengers would not be allowed to travel by freight trains on that part of the line between Portland and South Paris." On September 8th 1868, they issued notice that "no passengers will be carried in the brake-vans attached to freight trains without written authority from the superintendent. * * * Any conductor allowing a passenger to travel in the brake-van, or on any part of the freight train, will be dismissed."

The defendants requested the presiding judge to instruct the jury:

1. That the plaintiff was not entitled by law to be carried in the freight train of defendant company as a passenger, unless by permission obtained before he entered the train from some authorized agent of defendants; and that if the jury find that plaintiff entered the freight train at South Paris without such permission, then that plaintiff is not entitled to recover for the alleged injury, and their verdict should be for defendants.

2. That if the jury find that the defendant company, before the time of the injury received as alleged by the plaintiff, had established and published a regulation by which passengers were not allowed to travel by freight trains on that part of the line between Portland and South Paris, and that such regulation was in force at that time, then the plaintiff is not entitled to recover in this action, and their verdict should be for the defendants.

The judge did instruct the jury, *inter alia*, as follows: "I understand that the defence is substantially this, that inasmuch as notices had been issued and published by the directors of the company, prohibiting passengers from riding on freight trains, therefore this passenger being upon a freight train, the company was not liable for the injury that he received, though the company would have been liable if he had been in a passenger train. If there is any other defence, you have noticed it, and of course you will give them the benefit of it.

"I have been requested to give you a number of instructions touching this particular point, all of which I decline to give except this:

"I do instruct you, for the purposes of this case, that the plaintiff was not entitled by law to be carried on the freight train of defendant company, as a passenger, unless by permission obtained before he entered the train from some authorized agent of defendants. I give you that one, and no more. But I also instruct you, that if you find that the plaintiff was allowed by the conductor, upon his entering that car, and upon the starting of the train, to remain as a passenger on that train, in a saloon-car; that on a full knowledge of the facts, the conductor on that train allowed and authorized that man to remain there without directing him to get off, or any attempt to put him off, and that afterwards he received from him pay as a first-class passenger, not

only to the next station where the freight train was to stop, but beyond that station to Danville Junction, a further point on the road where the plaintiff desired to go (for I understand the evidence is that he was going to Lewiston, and Danville Junction was the furthest possible point in that direction on this road), then I instruct you that the defendant company cannot plead their regulation in release of their ordinary legal liabilities, but they are just as liable as if it had been a passenger train, and as if there had been no notices, provided that the plaintiff was not guilty of any fault or want of ordinary care himself."

The verdict was for the plaintiff, and the defendants alleged exceptions.

P. Barnes, for the defendants, cited *Lygo* v. *Newbold*, 9 Ex. 302; *Lucas* v. *Taunton & N. B. Railroad Co.*, 6 Gray 70; 2 Redfield 114, 3d ed.; *Elkins* v. *Boston & Maine Railroad Co.*, 3 Foster 275; *Robertson* v. *N. Y. & E. Railroad Co.*, 22 Barb. 91; *C. C. & C. R.* v. *Bertram*, 11 Ohio 457.

T. H. Haskell, for the plaintiff.

APPLETON, C. J.—The defendants are common carriers of passengers and freight. They may carry freight in their passenger train, or passengers on their freight train. They have a right to make all reasonable rules and regulations in the management of their business, with which those in their employ, or those making use of their means of conveyance, are bound to conform when informed of their existence.

By one of the regulations of the defendant corporation, after May 23d 1866, passengers were not "allowed to travel by freight trains on that part of the line between Portland and South Paris. The regulation was a reasonable one, and the defendants were authorized to make it. It is, however, fairly inferable from the regulation itself that previously passengers had been permitted to travel by the freight train. By the notice of September 8th 1868, dated at Montreal, no passengers were to be carried in the brake-vans attached to freight trains "without written authority from the superintendent." And "any conductor allowing a passenger to travel on the brake-van, or any part of the freight train, will be dismissed."

The plaintiff went aboard the freight train, in the saloon-car, and was there with the knowledge of the conductor. It was the duty of the conductor to inform him of this regulation, if it was to be enforced, and request him to leave. If no notice was given of this rule, and no request to leave, but instead thereof the usual fare was received, he had a right to suppose himself rightfully on board, and entitled to all the rights of a passenger. Every one riding in a railroad car is, *primâ facie*, presumed to be there lawfully as a passenger, having paid or being liable, when called on, to pay his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser: *Penn. Railroad Co.* v. *Books*, 7 Am. Law Reg. N. S. 529. If not being rightfully on board, and being advised thereof, the plaintiff neglected or refused to leave, the conductor had a right to remove him, using no more force than was necessary to accomplish that object: *Fulton* v. *G. T. Railway*, 17 Up. Can. 428; *Hilliard* v. *Goold*, 34 N. H. 230; *State* v. *Goold*, 53 Maine 279.

The regulations of the defendant corporation are binding on its servants. Passengers are not presumed to know them. Their knowledge must be affirmatively proved. If the servants of the corporation, who are bound to know its regulations, neglect or violate them, the principal should bear the loss or injury arising from such neglect or violation, rather than strangers. The corporation selects and appoints its servants, and it should be responsible for their conduct while in its employ. It alone has the right and the power of removal.

A passenger goes on board a freight train, enters the saloon-car, and remains there when the train starts, against the rules of the company, but with the knowledge of the conductor, and is not directed or requested to leave, but pays the usual fare of a first-class passenger to such conductor, and is injured on his passage by the negligence or carelessness of the railroad corporation. Is he entitled to compensation for such injury? If inert matter be injured or destroyed by the negligence or carelessness of a common carrier, its owner can maintain an action, and recover damages as a recompense for such injury. Is the traveller entitled to the protection of the law, when the negligence of the carrier destroys his goods, and without its protection, when the same negligence injures his health or breaks his limbs? If any extraordinary danger arises from the violation of the known rules

of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care: *Baker* v. *Portland*, 10 Am. Law Reg. N. S. 559.

In *Zump* v. *W. & M. Railroad Co.*, 9 Rich. (S. C.) 84, there were two cars on the train, and the plaintiff's seat was in the forward car. Near the door on the rearward car was a notice that passengers should not stand on the platform. The train was running over an unfinished part of the road. The cross-ties were too far apart, and were insufficiently spiked, and the accident arose from "the breaking of the cleat at the end of one of the rails." All the other passengers were inside the cars, and none of them injured. The defence was that the injury arose from the plaintiff's own fault in standing upon the platform while the cars were in motion. The verdict was for the plaintiff, which the court refused to set aside, holding that whether the plaintiff had notice that the platform was a prohibited place, and if so, then whether under the circumstances his own act so contributed to the injury as to exonerate the railroad, who were guilty of negligence, were for the jury. The plaintiff's seat, "it will be recollected," observes O'NEALE, J., "was in the forward car; the notice proved was in the rear car, on the platform of which he was standing when the accident occurred. That such notice is not enough to change the liability of the company to a passenger, is, I think, clear from Story on Bailment, § 558. If the conductor had said to the plaintiff, as was his duty, 'you are in an improper place,' and he had then persisted in remaining, it might have been that this would have excused the company from any consequences which might have followed." An action was brought against a railroad company by a passenger, while travelling in one of its gravel trains. The defendant asked the court to instruct the jury that a railroad company was not liable for an injury which might happen to one taking passage in a gravel train, and not engaged in carrying passengers. This requested instruction was held to be properly denied in *Lawrenceburgh & Up. Miss. Railroad Co.* v. *Montgomery*, 7 Porter (Ind.) 475, the court holding that in a suit brought against a railroad for an injury occasioned by a collision, it was not sufficient for the com-

pany to show that the plaintiff was acting at the time in disobedience of a proper order to secure his safety, but that it should also appear that the injury was occasioned by such disobedience. In *Watson* v. *Northern Railway Co.*, 24 Up. Can. (Q. B.) 98, the plaintiff travelling in the defendants' train on a passenger ticket, went into the express company's compartment of a car. While there, owing to the negligence of the defendants' servants, the train, which was stationary, was run into by another coming up behind it, and the plaintiff's arm was broken. No person in the passenger cars was seriously injured. It was proved that notice that the passengers were not allowed to ride in the baggage-car was usually posted upon the inside of the door of the passenger-cars, but it was not distinctly shown that it was there on that day. The jury found that the plaintiff was wrongfully in the car, but that he was not told where to go when he bought his ticket, nor did the conductor order him out, and so he was not to blame. "In my opinion," observes DRAPER, C. J., "the jury were warranted in finding that the plaintiff did not so contribute (to the injury) as to deprive him of the right to recover. Giving the fullest weight to the considerations urged in the defence,—such as the ticket which the plaintiff had, the notices stated to have been kept up in the cars, conceding the plaintiff saw them, though it is not proved,—I do not think they preclude the plaintiff from recovering, when the injury he sustained was occasioned by collision resulting entirely and directly from the gross negligence of the defendants' servants." In *O'Donnel* v. *Alleghany Valley Railroad Co.*, 59 Penn. 239, in a suit by an employee of a railroad company, who held the relation of a passenger, the court charged that the baggage-car is an improper place for a passenger to ride,—whether the rule against it was communicated to him or not, if he left his seat in a passenger-car and went into the baggage-car, it was negligence which nothing less than a direction or an invitation of the conductor could excuse,—and such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor without his objection. Held to be error.

That a railroad corporation cannot repudiate the acts of its agents so as to free themselves from responsibility, for their negligence, was held in *Lackawanna & Bloomsburgh Railroad Co.* v. *Chenowith*, 6 Am. Law Reg. N. S. 93, when the agents of a rail-

road company, contrary to the instructions and rules of the company, at the request of the owner of a freight-car, attached it to a passenger-car, the plaintiff agreeing to run all risks, the plaintiff having sustained a loss by the negligence of the defendant, brought his action for compensation. The same defence was attempted as in the case at bar. The plaintiff was not a trespasser, "for," observes THOMPSON, J., "he was there by permission, and under the contract of parties competent to give him authority to be there. * * * When, therefore, they (the defendants) consented to hitch on his (plaintiff's) car to the passenger train, even at his urgent solicitation,—and we have not a particle of evidence that other inducements to do the act were held out, excepting freedom from responsibility as a consequence of the attachment,—we must presume it was done with a view to the compensation to be paid on the one hand, and the usual care to be exercised on the other. The argument, however, is, that the plaintiff was guilty of such a wrong in asking for permitting his car to be attached, that whether the act contributed to the disaster or not, he is to be treated as a trespasser, and not entitled to any compensation for injuries not wilfully done. We think this is not the law, unless, in a case where the will of an agent is controlled and subverted by improper influences, he is induced to do that which is manifestly beyond the scope of his powers. That there was a regulation against running freight trains with passenger-cars may be admitted, although it was not properly proved, yet that neither proved that it might not be safely done, nor that if the company undertook to do it, they might lay aside the duty of care, and commit such cases to the guardianship of chance."

When a railroad company admits passengers into a caboose-car attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches at the time of the occurrence of the injury: *Edgerton* v. *N. Y. & H. Railroad Co.*, 39 N. Y. (12 Tiffany) 227. In *Carrol* v. *N. Y. & N. H. Railroad Co.*, 1 Duer 578, the plaintiff, remarks BOSWORTH, J., "took a seat in the post-office apartment of the baggage-car. The position was injudiciously chosen, and may be assumed to have been known to him to have been a far more dangerous one than a seat in a passenger-car. He took it with the assent of the conductor. He was not there as a tres-

passer, or wrongfully as between him and the defendants. So far as all questions involved in the decision of this action are concerned, he was lawfully there." His being there was not such negligence as would exonerate the defendants from the consequences of their negligence or want of care.

The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant company. They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation.

The question before the court was whether the defendants were liable at all as common carriers. The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not "plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself."

Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand: *The Chicago, B. & Q. Railroad Co.* v. *Hazzard*, 26 Ill. 373. "We have said in *The Chicago & Galena Railroad Co.* v. *Fay*, 16 Ill. 568," observes BREEZE, J., "that a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance, and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords."

If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But "the responsibility of a railroad company for the safety of its passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger:" *Ohio & Miss. Railroad Co.* v. *Mahling*, 30 Ill. 9. "The evidence," says WALKER, J., in that case, "shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train, as with their regular passenger coaches, for the safety of the persons and lives of their passengers."

If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction.

The cases to which our attention has been called, so far as we have been enabled to examine them, are inapplicable. In *Lygo* v. *Newbold*, 9 Exch. 302, the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant with his cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her. On the way the cart broke, and the plaintiff was thrown out and injured. Held, that as the defendant had not contracted to carry plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. But in that case, it does not appear that the defendant was a common carrier,—that he undertook to carry or received, or was to receive any compensation for the carriage of the plaintiff. In *Lucas* v. *New Bedford & Taunton Railroad Co.*, 6 Gray 65, it was held that a person who enters the cars of a railroad corporation, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, must, in order to maintain an action against the corporation for an injury sustained while leaving the cars, show that he exercised due care, that the corporation was wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or finding them in motion as he is going out, persists in making progress to get out, he cannot maintain such action, if his attempt causes or contributes to the injury, even if the corporation give him no

special notice of the time of departure of the cars, and are guilty of negligence in starting the cars, and in a jerk occurring after the first start, which negligence also contributes to the injury. But in that case the plaintiff was not a passenger; he was not there for the purpose of being transported. The servants of the corporation could not know, and were not obliged to know, the purpose for which he came aboard. Besides, the plaintiff must show due care. The implication from the case is, that with due care on the part of the plaintiff, and negligence on part of the corporation, the action was maintainable, and is adverse to the defendants.

Exceptions overruled.

KENT, DICKERSON, BARROWS, and TAPLEY, JJ., concurred.

It cannot be denied that the foregoing case is one of very great interest to the profession; and the opinion of the learned Chief Justice is drawn up with great care and after very deliberate examination of the cases bearing upon the questions involved. We are all accustomed to accept the opinions of that court with so much deference and respect, that we question whether any comment on our part will be regarded as of much account. But we cannot disguise the impression, made upon our own mind by the reading of the statement of the trial in the court below, that the defendants might very naturally have regarded the instructions of the learned judge as requiring of them a somewhat severe measure of duty. The opinion of the Chief Justice in the Supreme Court seems to escape most of the rigors of the case, as presented in the court below, by way of presumption or inference, from the admitted facts in the case. It seems to be assumed, both in the court below and in that of last resort, that the plaintiff was rightfully upon the train, at the time the damage or injury occurred, and that the defendants had made themselves common carriers of passengers so far as the plaintiff was concerned. And if that point is clearly established in the case, there would seem to be no question in regard to the soundness of the views presented in the opinion.

But the case of a passenger injured upon a freight train deserves unquestionably a very different consideration from one, when the injury occurs upon a passenger train. Upon the latter the conductor represents the company to the fullest extent as it regards the entire subject of receiving and transporting, as well as the safe delivery of the passengers. That is his regular employment, and in all that pertains to such employment the conductor stands in the place of the company; and his acts, and his declarations accompanying such acts, will bind the company to the fullest extent. And this is true even as to his omissions and the concessions thereby fairly implied. As, for instance, when the passengers are allowed, by the conductor, to pass from car to car, while the train is in motion, or to stand upon the platforms, or to sit in the baggage or express cars, there can be no fair question, that the company will be bound by his act.

And we should not be inclined to doubt, that where this, or any similar freedom, is constantly allowed the passengers upon passenger trains, without

objection or remonstrance on the part of the conductors, the company must be regarded as having acquiesced in the practice, although in conflict with their general regulations, properly advertised in the cars. We suppose some such relaxation is found indispensable on the American railways, in order to keep the peace with the passengers. For among us there is a considerably numerous and influential class of passengers, who almost insist upon perfect freedom of locomotion and observation, in all places and under all circumstances. The propensity proceeds doubtless from different motives, in different persons. Some do it from mere listlessness and unrest; others from curiosity and to satisfy a morbid sense of inquisitiveness; and others still to show they can do it, and not suffer detriment. There are doubtless many other reasons, as to find out friends and acquaintances, &c. But certain it is, no conductor can control or hinder it if he were ever so much disposed to do so. People, in this country, will insist upon making all the railway tracks common highways for foot passengers; and equally upon climbing about in all directions upon moving passenger trains; and there seems to be no remedy, but to submit to it. They all feel, that it is unsafe for others, but indispensable for themselves to do so. And if railway companies are compelled to submit to it, all that we can say is, that the blame cannot be thrown upon their servants but must rest upon themselves. But the cases of passengers and strangers are by no means analogous. There is, for instance, no implied permission to a stranger to walk upon a railway track, because the road-master does not drive him off, as he doubtless might, if he chose. But having no responsibility in the matter, he is not obliged to do so; and no implied assent is the result of his omission to do so. But in the case of passengers it is different. They are, for the time, under the control of the conductors, and their duty is to put them in a safe place, and keep them there. And if they offer to violate the rules of the company, by riding upon the platforms, or in the baggage car, or in any other mode out of the ordinary and safe course, it is the right and the duty of the conductors to forbid them, in the most peremptory manner, and if they persist in their course, to compel them to desist by force, if need be. And if the conductors do not exercise their right and duty in these particulars, they must be regarded as having assented to the course pursued by the passenger, subject of course to the increased risk, thereby incurred, being borne by such passenger. And, subject to this qualification, the act of the conductor, upon a regular passenger train, must be regarded as binding the company to an assent to carrying the passenger in that mode. And the same would be true, probably, if some foolhardy passenger (of which there are multitudes all over the country, especially during the summer excursions, in search of new adventures), should insist upon standing upon his head, or lying his full length upon the platform of the cars during the entire passage. The company must be regarded as bound by the act of the conductor, if he did not forcibly prevent it, at least to the extent of stipulating to carry the passengers in that mode, as safely as it was practicable to do in that peculiar mode of transportation. If the passenger was damaged in consequence of his foolhardiness, in persisting in riding in that particular mode, he could not recover of course. But if he could show that his peculiar mode of riding did not contribute to his injury, but that it resulted *wholly* from the negligence of the company, he might unquestionably still recover.

But as we understand the settled law

upon the subject, in regard to passenger transportation upon freight trains, the rule of implication, as against the companies, resulting from the acts, declarations, and acquiescence of the conductors, is entirely different, we might say the reverse, from what it is upon passenger trains. Upon the freight trains of a railway company the conductors have no implied authority to bind the company by allowing persons to be carried as passengers. Every one is presumed to have notice, that railways do not carry passengers upon their ordinary freight trains, and that if one is allowed to pass upon them as a passenger, it is conceded as a favor and subject to the implied condition, that they will incur the additional risk and inconvenience necessarily incident to that mode of transportation. This rule has been often declared and is recognised in the principal case as well as in many others: *Murch* v. *Concord Railway*, 29 N. H. 9, where the question is discussed and very fairly presented by Mr. Justice BELL.

"The stage proprietor is a carrier of passengers by his coaches, but he does not thereby become a common carrier of passengers by his baggage wagons, if he carries on that business at the same time. Both the companies and the individuals, in these cases, are bound to their customers by the same duties relative to their freight trains and baggage wagons, and have the same rights as to the roads over which they travel, as if they had no connection with the business of common carriers of passengers." * * * "The first question which arises upon the point is, whether the railroad companies have made themselves common carriers of passengers by the freight trains * * * ?" "It is very clear that a wagoner, who occasionally carries a passenger upon his wagons as a matter of special accommodation and agreement, does not thereby become a common carrier of passengers. He only becomes such when the carrying of passengers becomes an habitual business. * * * Upon the evidence stated in the case that 'both roads had been in the habit of *occasionally* transporting some passengers upon the freight trains, when they were anxious to go,' we think we should not be justified in saying that they were common carriers of passengers upon their freight trains: *Elken* v. *B. & M.*, 3 Foster 275."

It seems to us that this presents the question in its true light, and we should seriously question, whether a conductor of a freight train can fairly be said to have any authority to bind the company, by accepting passengers upon his freight trains. It seems to us that justice to the companies requires, that any one who rides upon a freight train should be required to show permission to do so from the superintendent of the road, just as much as if he were riding upon the engine, in order to show himself rightfully upon the train. The conductor of a freight train has no more right to accept passengers for transportation, than has the baggage-master or the engineer upon a passenger train, to allow passengers to ride with them in their departments. We have always maintained the necessity of holding railways to the strictest responsibility in regard to passenger transportation. But we should, at the same time, require passengers to submit obediently to all the just requirements of the companies, and if they needlessly and understandingly departed from them, to accept the consequences in patient submission. If railway companies run passenger cars upon their freight trains, or in any other mode invite passengers to accept passage upon them, the company are bound to the same degree of responsibility as if they carried them in regular passenger trains. But where this is only occasional and for the accommodation

of the passenger, the rule of construction should be, we think, in favor of the company and the passenger be required to show clearly that he rode in that mode by the consent of the proper agent of the company, which in this case, it seems to us, the conductor of the freight train was not; but we urge this view with hesitation against so high authority.

I. F. R.

Supreme Court of Errors of Connecticut.

JULIUS TYLER AND ANOTHER *v.* ALFRED TODD.

In a suit against the defendant as endorser of a promissory note, the question being whether the endorsement was genuine or forged, and the defendant claiming that his name had been forged to a large number of notes of the same maker, and that this was one of them, the plaintiffs introduced a witness who testified that he received the note from the maker and sold it to one E., from whom it appeared that the plaintiffs received it. *Held*, that on cross-examination he might be inquired of as to having purchased other notes with the defendant's name endorsed thereon, such evidence tending to show that the witness might be mistaken in relation to the particular note by confounding it with some of the others.

The defendant testified in his own behalf that he had received forty-eight notices of protest as endorser of notes of the same maker from banks within a few months, and stated the amounts of the notes. *Held*, that this evidence was admissible in connection with his previous testimony that he had endorsed but one of the notes protested, as tending to prove that there was a large number of forgeries, a fact material to be shown in order to establish an alleged confederacy between the maker of the notes and certain other parties.

Questions of this character, involving a great variety of transactions with the accompanying circumstances, often require the testimony to take a wide range.

Where it does not appear clearly on what ground testimony objected to was admitted, and it was admissible for any purpose, the court cannot regard it as having been admitted for an improper purpose.

Where an objectionable question was asked and was permitted on objection by an auditor, but the witness in his answer stated only a fact that was admissible in evidence, it was held that the impropriety of the question was not a sufficient reason for setting aside the auditor's report.

Where the same question was repeated and the witness answered it in a manner that was in itself inadmissible, but the counsel at once disclaimed it as evidence, it was held that the impropriety of the question and answer was not a sufficient reason for setting aside the auditor's report.

Where a witness was introduced as an expert in judging of the genuineness of signatures, it was held to be proper for the party calling him to inquire of him as to his residence, his occupation, and the length of time he had been engaged in business that would qualify him to judge of signatures, and also to his actual experience in such matters as a witness in court.

Upon the question whether a signature is genuine or forged it is the practice in